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No. 03-569

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALLIANT ENERGY CORPORATION,

Petitioner,

v.

BURNEATTA BRIDGE, AVE M. BIE AND ROBERT M. GARVIN, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE WISCONSIN PUBLIC SERVICE COMMISSION,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

BRIEF OF ENERGY INDUSTRY AMICI AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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25 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE SEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENT 4

A. The *Pike* Balancing Test Applies Here. 4
B. Alliant Quotes The Seventh Circuit Out Of Context. 6

II. THE SEVENTH CIRCUIT CORRECTLY RECOGNIZED THAT UTILITIES AND THEIR HOLDING COMPANIES HAVE NEVER BEEN ALLOWED TO OPERATE IN THE SAME UNRESTRICTED MANNER AS OTHER CORPORATIONS. 7

A. Federal Regulation 8
B. State Regulation 10
C. Petitioner's Corporate History 13

III. THE SEVENTH CIRCUIT'S DECISION DOES NOT HAVE THE BROAD IMPLICATIONS ON THE REGULATION OF INTERSTATE COMMERCE THAT PETITIONER FORECASTS ... 15

CONCLUSION 17

TABLE OF AUTHORITIES

Federal Cases

Arkansas Electric Coop. Corp. v. Arkansas Public Service Comm'n,
461 U.S. 375, 377 (1983) 10

Baltimore Gas & Elec. Co. v. Heintz,
760 F.2d 1408 (4th Cir. 1985) 16

Brown-Forman Distillers Corp. v. New York State Liquor Auth.,
476 U.S. 573, 579 (1986) 5

Edgar v. MITE Corp.,
457 U.S. 624 (1982) 6, 7

Fahey v. Mallonee,
332 U.S. 245, 256 (1947) 14, 15

Healy v. Beer Institute,
491 U.S. 324, 335-40 (1989) 6

North American Co. v. Securities & Exchange Commission,
327 U.S. 686, 690-692 (1946) 8, 9

Pike v. Bruce Church, Inc.,
397 U.S. 137, 142 (1970) 4, 16, 17

Southern Union Co. v. Missouri Pub. Serv. Comm'n., 289 F.3d 503 (8th Cir. 2002) 16

State Cases

Merger Order, Public Service Commission of Wisconsin (Docket No. 6680-UM-100) (November 4, 1997) 13, 14

Wisconsin Power & Light Co. v. Public Service Comm'n, 148 Wis. 2d 881, 891, 437 N.W.2d 888, 892 (Wis. App. 1989) 11

Federal Statutes

49 Stat. 803, (1935) 15 U.S.C. § 79 (Public Utility Holding Company Act "PUHCA") 8, 10

State Statutes

Wis. Stat. § 15.79 11

Wis. Stat. § 196.02(1) 11

Wis. Stat. § 196.03 11

Wis. Stat. § 196.49 11

Wis. Stat. § 196.495 11

Wis. Stat. § 196.79 ..... 11, 13

Wis. Stat. § 196.795
(Wisconsin Public Utility Holding
Company Act "WUHCA") 1, 3, 4, 13, 15, 16

1985 Wis. Act 79 ..... 12, 13

Other Authorities

Hawes, Donald W.
Utility Holding Companies (1987) 12

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Energy Troubles Spark Lawsuits
(June 20, 2001) 9, 10

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California's Largest Utility Files for
Bankruptcy (April 7, 2001) 10

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(3rd ed. 1993), ... 9

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Energy Utility Diversification: Its
Status in Wisconsin (August 7, 1986) 11

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State Courts Can Hear Gouging Suits,
Judge Rules (August 3, 2001) 9

Securities and Exchange Commission - Division of Investment Management
The Regulation of Public-Utility Holding Companies (June 1995) 8, 9

Shephard, William G. and Wilcox, Clair
Public Policies Toward Business
(6th ed. 1979) 9

Wisconsin Blue Book (2003-2004) 10

INTEREST OF AMICUS CURIAE[1]

The energy industry has, of late, been in the headlines for all the wrong reasons. Indeed, the industry's scandals, system failures, and deregulation debacles have been profoundly disturbing. Thankfully, Wisconsin's energy consumers have been insulated from such disasters through the state's longstanding, comprehensive framework of public utility regulation. Alliant Energy Corporation ("Petitioner" or "Alliant"), however, seeks to upset Wisconsin's carefully crafted structure. The Energy Industry Amici have a strong interest in ensuring that Wisconsin's overall regulatory scheme remains intact.

Petitioner attacks the constitutionality of certain provisions of the Wisconsin Public Utility Holding Company Act ("WUHCA"), Wis. Stat. § 196.795. WUHCA authorizes the formation of holding companies, like Alliant, that can own both public utilities and non-utility corporate affiliates. It also contains key protections to ensure that such companies properly manage and maintain the public utilities that supply Wisconsin's consumers with reliable and reasonably priced energy.[2] If those provisions are struck

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amicus curiae* declare that this brief filed in support of the Respondent was funded by the Customers First! Coalition and the Wisconsin Industrial Energy Group. The Customers First! Coalition is an organization to which all of the Energy Industry Amici, with the exception of George Edgar and the Wisconsin Industrial Energy Group, belong. The brief was authored entirely by counsel for the Energy Industry Amici.

[2] Notably, Alliant does not challenge those aspects of WUHCA which allow it to exist and operate as a public utility holding company in Wisconsin. It only challenges those provisions which protect against holding company abuses.

down, the state's utilities, municipal power purchasers, electric cooperatives, utility workers, and ultimately, all ratepayers – residential, commercial and industrial – will be hurt. The Energy Industry Amici: the Citizens' Utility Board; Municipal Electric Utilities of Wisconsin; Dairyland Power Cooperative; Wisconsin Federation of Cooperatives; Wisconsin Merchants Federation; Wisconsin Public Power, Inc.; Wisconsin Industrial Energy Group; International Brotherhood of Electrical Workers-Locals 2304 and 2150; and ratepayer George Edgar have actively participated in this case from the outset.[3]

Each entity within the Energy Industry Amici has a vital interest in the integrity and effectiveness of the state's public utility regulatory structure. The Seventh Circuit's ruling protects that interest, recognizing Wisconsin's long history of effective public utility regulation and the continued need for meaningful statewide regulatory oversight of public utilities and public utility holding companies. Reversal of that ruling would undermine the scope of that oversight and have devastating effects on Wisconsin and its citizens.

[3] The Energy Industry Amici participated in the District Court and moved for amicus status in the Seventh Circuit. The Seventh Circuit denied that request.

SUMMARY OF ARGUMENT

The challenged provisions of the WUHCA are part of a framework of regulation, first developed in 1907, that recognizes public utilities for what they are: essential public services. Traditionally, regulation of utilities has been a quintessential matter of local concern. To be sure, the Wisconsin legislature did not take lightly the State's regulatory framework. WUHCA's provisions delicately and successfully balance the interests of utilities, their customers and the public. Petitioner now seeks to disturb this carefully crafted regulatory scheme. But, as the Seventh Circuit correctly concluded, there are no legally sustainable grounds for doing so.

The Seventh Circuit's Commerce Clause analysis, and its ultimate rejection of Petitioner's constitutional challenge to WUHCA, was based squarely on this Court's precedents. Having no controlling case law to cite or meritorious grounds on which to base its challenge to the law, Petitioner frames a *plurality* opinion favorable to its WUHCA Commerce Clause challenge as *precedent*. Petitioner then selectively chooses statements from the Seventh Circuit's decision and relies on inapposite case law in an attempt to support its assertion that *per se* Commerce Clause scrutiny is appropriate in this case. Petitioner ignores the very heart of the Seventh Circuit's ruling: its thorough discussion of the State's strong interest in protecting Wisconsin's energy consumers from the "dangers inherent in the mere existence of utility holding companies." (Pet. App. at 34a).

The Energy Industry Amici submit that Petitioner's description of the law and record of this case is erroneous at best, and disingenuous at worst. Petitioner's misstatement of the most fundamental principles of Commerce Clause

analysis, mischaracterization of the nature of the Seventh Circuit's decision and overstatement of that decision's potential effects on interstate commerce highlight the weakness of Petitioner's case. As the Seventh Circuit correctly held, the Commerce Clause simply does not provide Petitioner a right to the wholesale regulatory exemptions it seeks. As hard as it may try, Petitioner cannot obtain deregulation of Wisconsin utility holding companies by cloaking itself in the Commerce Clause.

ARGUMENT

I. THE SEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENT.

A. The *Pike* Balancing Test Applies Here.

Review of the Seventh Circuit's decisions and the case law cited therein confirms that the court, in finding WUHCA's provisions constitutional, correctly performed the two-tiered Commerce Clause analysis firmly established by this Court. Indeed, the Seventh Circuit closely and carefully reviewed the challenged regulations, determined that those regulations have indirect and evenhanded incidental effects on interstate commerce and extraterritorial transactions and then applied the corresponding balancing test adopted in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). (Pet. App. at 30a-36a). Upon balancing the State's interest in protecting Wisconsin consumers from utility holding company abuses against the regulations' burden on interstate commerce, the court found the State's interest to be superior. *Id.* at 36a. The Seventh Circuit performed every step of the analysis just as this Court requires, and the outcome was correct.

Petitioner argues that prior decisions of this Court mandate the *per se* invalidation of every state regulation that has any extraterritorial effect whatsoever, and that the Seventh Circuit's decision conflicts with that principle. (Pet. at 14). That characterization of Supreme Court precedent is simply wrong. As the Seventh Circuit stated in its decision on Alliant's petition for rehearing, *en banc*, "this principle is not established by the cases [Petitioner] cite[s] and is contradicted by other authority." (Pet. App. at 2a.)

The most fundamental flaw in Petitioner's position is its reliance on a plurality opinion authored by Justice White in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), and its assertion that the plurality opinion was adopted later by this Court in *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). (Pet. at 11). In fact, the plurality opinion, which said that "[t]he Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," is not a definitive holding of this Court. *Edgar*, 457 U.S. at 642-43. Consequently, the Seventh Circuit was not obligated under the rationale of the plurality statement.

Moreover, while this Court did in *Brown-Forman Distillers* cite to Justice White's plurality opinion, the citation merely was for the well-established proposition that *direct* regulation of interstate commerce is *per se* unconstitutional. 476 U.S. at 579, 582. That proposition is irrelevant to Petitioner's challenge: WUHCA's impact on interstate commerce is indirect and evenhanded. (Pet. App. at 4a).

The other cases relied on by Petitioner contemplate *direct* extraterritorial regulation and do not support Petitioner's assertion that all extraterritorial regulation, direct

or indirect, is *per se* invalid regardless of that regulation's benefit to the state. *See Healy v. Beer Institute*, 491 U.S. 324, 335-40 (1989).

B. Alliant Quotes The Seventh Circuit Out Of Context.

Petitioner uses creative editing of the Seventh Circuit's decision to make the cases it cites on direct extraterritorial regulation appear to be helpful to its cause. By selecting specific excerpts and citing them out of context, Petitioner misconstrues the character of the Seventh Circuit's analysis. Petitioner is particularly enamored of the "victory" quote. In its description of the "Proceedings Below," Petitioner asserts that "[n]otably, the Seventh Circuit stated that '[w]e have no doubt that the provisions do in fact impact extraterritorial commerce' and noted that application of *per se* scrutiny 'would mean victory for [AEC] . . . .'" (Pet. at 4-5). By omitting the surrounding language Petitioner mischaracterizes the essence of the Seventh Circuit's reasoning:

> We have no doubt that the provisions do in fact impact extraterritorial commerce (see our examples above); but we disagree with the proposition that this renders the provisions per se invalid. To support its argument Alliant directs our attention to the opinion of Justice White in *Edgar v. Mite* . . . . The language, if controlling, would mean victory for Alliant; the only problem is that the language . . . did not draw support from a majority of the Court and is therefore not the opinion of the Court.

(Pet App. at 31a).

Alliant quotes the fractured "victory" excerpt again in a footnote later in the petition, but there correctly acknowledges that the Seventh Circuit rejected Justice White's analysis because it was only the plurality opinion in *Edgar*. (Pet. at 10 n.3). However, in its footnote, Alliant continues to misleadingly say that the language in *Edgar* was adopted in later cases. *Id.* As discussed above, when the language was quoted by the majority of the Supreme Court in later cases, it was for the unremarkable proposition that *direct* extraterritorial regulation is *per se* invalid. (Pet. App. at 5a-7a). That proposition is irrelevant because the regulations at issue here only indirectly and evenhandedly affect commerce outside of Wisconsin.

II. THE SEVENTH CIRCUIT CORRECTLY RECOGNIZED THAT UTILITIES AND THEIR HOLDING COMPANIES HAVE NEVER BEEN ALLOWED TO OPERATE IN THE SAME UNRESTRICTED MANNER AS OTHER CORPORATIONS.

Petitioner wants to be treated like a non-utility corporation. The longstanding regulatory framework of the utility industry at both the federal and state levels, however, precludes such treatment. Indeed, Petitioner has no constitutional right to an unrestricted free market – its utility businesses are, and always have been, regulated in the public interest. It is no wonder, then, why Petitioner all but ignores the Seventh Circuit's discussion of the State's significant interest in protecting Wisconsin ratepayers from utility holding company abuses. *Id.* at 8a-9a, 32a-34a. In its decision, the court correctly recognized that the challenged aspects of Wisconsin's utility holding company regulation were enacted, and remain in place, to cure and prevent abuses and potential abuses that harm investors, utility

service customers and the public interest. As discussed in detail below, the reasons for regulating utilities and their holding companies at the state level are the same today as they were in 1935 when, at the federal level, Congress passed the Public Utility Holding Company Act ("PUHCA"), 49 Stat. 803, (1935), 15 U.S.C.§ 79, *et seq*.

A. Federal Regulation.

By the 1920s, public utility holding companies in some states had formed highly leveraged, complicated structures through which they controlled public utilities operating in multiple states. *See North American Co. v. Securities & Exchange Commission*, 327 U.S. 686, 690-692 (1946). While that yielded extremely high profits, it did so to the detriment of the operating public utilities and utility customers. "The holding company structure permitted [investment bankers] to concentrate control of vast utility empires in a few hands, which led to deception of investors, excessive rates for consumers, and obstruction of state utility regulation." *See* Securities and Exchange Commission - Division of Investment Management, *The Regulation of Public-Utility Holding Companies* 11-12 (June 1995), *see also North American Co.,* 327 U.S. at 701, (citing Section 1(b) [Congressional findings] of the PUHCA); *id.* at 703 n.13 (quoting the Report of the National Power Policy Committee on Public Utility Holding Companies, H.R. Doc. 137, 74th Cong., 1st Sess., at 5).

Because of the complexity and geographic diversity of the holding companies, states did not have effective regulatory control over them. In the late 1920's and early 1930's, the Federal Trade Commission and the House Interstate and Foreign Commerce Committee sponsored detailed studies of the public utility industry. They found a pattern of widespread abuses, many of them "almost

inherent" in the holding company system, that were detrimental to both investors and consumers. *The Regulation of Public Utility Holding Companies, supra* at 13.

The abuses and potential abuses of monopoly power and the holding company structure led directly to enactment of the Public Utility Act in 1935. Title I of that Act is PUHCA. Title II, the Federal Power Act ("FPA"), subjected electric utilities engaged in interstate transactions to the jurisdiction of the Federal Power Commission (now the Federal Energy Regulatory Commission ("FERC")). *See* Charles F. Phillips, Jr., *The Regulation of Public Utilities*, 625-635 (3rd ed. 1993)(discussing history of Act in detail).

PUHCA gave the Securities and Exchange Commission ("SEC") the authority to reorganize and regulate public utility holding companies. PUHCA is arguably the most comprehensive regulatory measure ever applied to American business. William G. Shepherd and Clair Wilcox, *Public Policies Toward Business* 325 (6th ed. 1979). Under the FPA and PUHCA, the FERC and the SEC regulate the activities of holding companies in a variety of areas - including rates, financial and operational reporting requirements, securities issuance, disposition of utility assets, mergers and acquisitions, transactions with affiliated companies, and corporate reorganizations - in furtherance of the public interest. PUHCA has survived several constitutional challenges. *See, e.g., North American Co. v. Securities & Exchange Commission*, 327 U.S. 686 (1946).

Yet, abuses and potential abuses by public utilities and their holding companies continue. The chaos in California's energy markets spawned a number of lawsuits and investigations on that very subject. *See*, e.g., *State Courts Can Hear Gouging Suits, Judge Rules,* S.F. CHRON., August 3, 2001, at A5; Laura Goldberg, *Energy*

Troubles Spark Lawsuits, HOUS. CHRON., June 20, 2001, at A1. For example, while Pacific Gas and Electric Company, a utility, was in Chapter 11 bankruptcy, its holding company, PG&E Corporation, stood accused of siphoning off billions of dollars in earnings from the utility and transferring that money to unregulated subsidiaries where it was out of reach and unavailable to help the utility continue to serve its customers. *See* Laura M. Holson, *California's Largest Utility Files for Bankruptcy,* N.Y. TIMES, April 7, 2001, at A1.

With diversification, utility holding companies have become involved in non-energy and non-regulated businesses. The Seventh Circuit recognized that cross-subsidization, which arises when a holding company uses its utility subsidiaries, directly or indirectly, to support unregulated, non-utility ventures, almost inevitably arises at the utility level from diversification. That problem necessitated the WUCHA provisions now challenged. (Pet. App. at 32a-33a).

B. State Regulation.

The states, including Wisconsin, have always had - and used - the broad authority under their police powers to regulate public utilities and holding companies. This Court has stated that "the regulation of utilities is one of the most important of the functions" of state governments under the police power. *Arkansas Electric Coop. Corp. v. Arkansas Public Service Comm'n,* 461 U.S. 375, 377 (1983).

Wisconsin's regulation of all public utilities started in 1907. *See Wisconsin Blue Book* 477 (2003-2004). Since 1931, the Public Service Commission of Wisconsin ("PSCW") has had the administrative authority to oversee Wisconsin public utilities, including many of the activities of

public utility holding companies. *Id.*; *see* Wis. Stat. §§ 15.79 and 196.02(1); *see also Wisconsin Power & Light Co. v. Public Service Comm'n*, 148 Wis. 2d 881, 891, 437 N.W.2d 888, 892 (Wis. App. 1989) (citations omitted). Public utility companies operating in Wisconsin have legal monopolies to provide electric service within a service territory designated by the State. *See* Wis. Stat. §§ 196.49 and 196.495. In exchange for those monopolies, the PSCW requires the utility companies to provide reliable and reasonably priced utility services. *See* Wis. Stat. §§ 196.02(1) and 196.03.

Twenty-three years ago, there were no utility holding companies in Wisconsin. Debate over public utility diversification and holding companies for utilities began in Wisconsin in April 1980, when Wisconsin Gas Company formed a parent company known as WICOR. *See* J. Robert Malko and George R. Edgar, *Energy Utility Diversification: Its Status in Wisconsin*, Public Utilities Fortnightly, Aug. 7, 1986 at 4. Wisconsin Gas established WICOR without the PSCW's approval, asserting the Commission had no jurisdiction over the formation of public utility holding companies. *Id.*

Meanwhile, Wisconsin Electric Power Company and Wisconsin Power and Light Company ("WPL"), were evaluating the formation of their own holding companies. *Id.* In September 1981, before either of those utility companies formed a holding company, the PSCW ruled that it had jurisdiction, pursuant to Wis. Stat. § 196.79, over utility holding company formation. Shortly thereafter, the PSCW promulgated the first administrative rules for public utility holding companies. *Id.*

By 1983, the PSCW itself had proposed holding company legislation, but the Wisconsin legislature narrowly rejected it. After that defeat, a number of utilities made a

concerted effort to demonstrate the need for diversification. *Id.* at 5. On November 19, 1985, 1985 Wis. Act 79 - the Wisconsin Public Utility Holding Company Act - allowing and regulating utility holding companies became effective. *See* Douglas W. Hawes, *Utility Holding Companies* § 4.03[20] at 4-50 (1987).

The goals of the legislation are found in the Act's "Findings and Purpose":

> (3) The state has a legitimate interest in regulating the structure of nontelecommunications public utilities and their holding companies to ensure the ability of the public utilities to continue to provide safe, reliable and reasonably priced service to consumers.
>
> (4) The maintenance of a financially healthy nontelecommunications public utility is contingent upon the maintenance of an economically healthy service area.
>
> (5) The public interest and the interest of investors and consumers can be benefitted if public utility holding companies, in the service territories of their public utility affiliates or in this state:
>
> (a) Conduct substantial business activities.
> (b) Attract new businesses.
> (c) Expand existing businesses.
> (d) Provide investment capital for new business ventures.
> (e) Otherwise directly or indirectly promote employment and commerce.

1985 Wis. Act 79, § 1.

In short, WUHCA was designed to maintain the financial health of the utilities by encouraging economic development in the utility's own "service area" that would result from utility diversification while, at the same time, preserving the State oversight necessary to maintain safe and reliable service for the State's consumers.

C. Petitioner's Corporate History.

Petitioner did not always believe provisions of WUHCA to be unconstitutional. To the contrary, as shown by its own history, Petitioner accepted the State's regulation as a condition of its very existence and, consequently, cannot challenge parts of the regulatory framework that it now finds "unsuitable" to its current business profile and pursuits. (Merger Order, PSCW Docket No. 6680-UM-100 (November 4, 1997)). Petitioner appears to have discovered unconstitutional aspects of WUHCA only after Petitioner, thanks to WUHCA, developed into a large, multi-state holding company.

On April 30, 1987, the PSCW approved WPL Holdings, Inc.'s request to become the parent company of WPL pursuant to 1985 Wis. Act 79. Wis. Stat. § 196.795. On November 11, 1995, WPL Holdings, Inc. entered into a merger agreement with IES Industries, an Iowa-based public utility holding company, and IPC, an Iowa-based public utility. Under the terms of the merger agreement, WPL Holdings, Inc. was the surviving corporation based in Wisconsin. WPL Holdings, Inc. changed its name to Interstate Energy and then to Petitioner's current name, Alliant Energy Corporation. As a result of those

transactions, WPL, IES Utilities ("IES-U") and IPC all became public utility subsidiaries of Petitioner.

In 1997, the merger received approval from FERC, the PSCW and the public utility commissions of Illinois, Iowa and Minnesota.[4] In its order approving the merger, the PSCW reiterated its authority "to condition the series of interrelated transactions resulting in the proposed merger upon acceptance by WP&L, [WPL Holdings, Inc.] and [Petitioner] of the [PSCW's] order provisions." Merger Order, PSCW Docket No. 6680-UM-100 at 50. Among those "order provisions" was the statutory asset cap requirement that Petitioner now challenges - a requirement that limits the percentage of assets that a holding company may invest in non-utility affiliates. The specific order provision applicable to Petitioner stated:

> The investment in the holding company and nonutility affiliates shall be limited to 25 percent of the Wisconsin and non-Wisconsin utility assets of IEC (including WP&L, IPC, and IES-U) for purposes of s. 196.795(5)(p), Stats.

Id. at 58.

Thus, Petitioner exists *solely* by virtue of the Wisconsin statutes that allow utility holding companies to exist and the PSCW order authorizing the merger - an order that was specifically premised on the application of the statutory "asset cap." Accordingly, Petitioners are estopped from challenging the constitutionality of the statutory and regulatory system that gives it its existence. *See Fahey v.*

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[4] On April 14, 1998, the SEC granted the final approval necessary for the merger.

Mallonee, 332 U.S. 245, 256 (1947) ("[O]ne who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions."). Although the Seventh Circuit did not decide the case on estoppel grounds, it recognized as to the provisions at issue in this Petition that:

> It is not all clear that Wisconsin would have authorized the formation of public utility holding companies had it not been for these protective controls. It therefore appears improper to sever the structural provisions from §196.795(2) [the provision providing for and authorizing the formation of utility holding companies]. The fact that the structural provisions are probably not severable from §196.795(2) suggests that the reasoning of *Fahey* would apply to estop Alliant here.

(Pet. App. at 18a).

III. THE SEVENTH CIRCUIT'S DECISION DOES NOT HAVE THE BROAD IMPLICATIONS ON THE REGULATION OF INTERSTATE COMMERCE THAT PETITIONER FORECASTS.

Petitioner asserts that the Seventh Circuit's decision upholding the WUHCA provisions will not only affect the utility industry, but will also have far-reaching implications on all businesses engaged in interstate commerce. (Pet. at 26, 28-29). Its assertion lacks merit. First, in regard to the utility industry, Wisconsin did not pass the challenged statutes to isolate itself or to protect its utility industry from competition on the interstate market. Rather, Wisconsin

enacted the provisions as an indispensable part of the overall regulatory framework in this State. The Seventh Circuit correctly ruled that any indirect burdens on interstate commerce that result from WUHCA do not outweigh the state's interest in using its police powers to protect its citizens from holding company abuses.

Second, the Seventh Circuit's decision is consistent with the decisions made by other federal Courts of Appeal. Both the Fourth Circuit and the Eighth Circuit Courts have performed Commerce Clause analyses on regulations similar to those challenged here, and have explicitly found that any burden on interstate commerce resulting from those regulations is at most incidental. The Fourth Circuit, in *Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408 (4th Cir. 1985), upheld the constitutionality of Maryland's holding company law which prohibited non-public utilities from, among other things, acquiring more than 10% of a Maryland public utility. In so holding, the Fourth Circuit noted that the burdens imposed by the law – restricting the ability to diversify by acquiring nonutility assets and the ability to secure financing and to exchange corporate securities – only minimally affected interstate commerce. *Id.* at 1425.

Similarly, the Eighth Circuit, in *Southern Union Co. v. Missouri Pub. Serv. Comm'n.*, 289 F.3d 503 (8th Cir. 2002), applied the *Pike* balancing test and upheld a law that required approval from Missouri's Public Service Commission before a utility serving Missouri ratepayers could purchase stocks or bonds issued by any other utility. The Eighth Circuit found that this requirement passed Constitutional muster, despite its impact on interstate commerce, because of the importance of State regulation of utilities and the protection of ratepayer welfare.

The Seventh Circuit's decision in this case is squarely in line with both Supreme Court and other Circuit Court decisions. No utility holding company can honestly claim to be surprised by the court's decision, nor can it be said that the decision is changing the way those businesses do business. The decision represented a straightforward and unremarkable application of firmly established Supreme Court guidance. Most certainly, the mere application of the longstanding legal principle - the *Pike* balancing test - to Wisconsin's regulation of its utility holding companies will have no implication for other businesses engaged in interstate commerce.

CONCLUSION

For the foregoing reasons, the Energy Industry Amici respectfully request that the Petition for Writ of Certiorari requested by the Petitioner Alliant Energy Corporation be denied.

Respectfully submitted,

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